No. 80-148

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IN THE SUPREME COURT

OF THE

UNITED STATES

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OCTOBER TERM, 1980

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JEFFREY RICHARD ROBBINS,
Petitioner,

v.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

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ON WRIT OF CERTIORARI TO THE
COURT OF APPEAL OF THE
STATE OF CALIFORNIA,
FIRST APPELLATE DISTRICT

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# BRIEF FOR RESPONDENT

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## QUESTIONS PRESENTED

1. Did petitioner have an expectation of privacy in the containers in his car so intense that police were constitutionally required to secure a warrant before examining them?

2. Should the exclusionary rule be invoked to suppress evidence seized in reasonable reliance on state and federal decisions antedating United States v. Chadwick, 433 U.S. 1 (1977)?

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FIRST APPELLATE DISTRICT

## OPINION BELOW

The opinion of the Court of Appeal of the State of California, First Appellate District, Division Four, filed on March 4, 1980, is appended to the Petition for Writ of Certiorari and may

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be found at 103 Cal.App.3d 34, 162 Cal.Rptr. 780.[1/]

## JURISDICTION

Petitioner would invoke this Court's appellate jurisdiction under Title 28, United States Code sections 1257 and 2101. Jurisdiction is

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1. The court of appeal filed two earlier opinions, both unpublished, in this case. The first, filed on June 30, 1976, was vacated by that court's order of July 22, 1977. Petitioner's appeal was reinstated for further briefing and oral argument. Prior to its vacation, petitioner had sought review of this first opinion by petition for writ of certiorari filed in the United States Supreme Court on December 14, 1976 (No. 76-817). Following a response by the State of California, this Court denied the petition.

After reinstatement of the appeal, the court of appeal filed a second opinion on May 9, 1978, and amended it on May 22, 1978. After denial of a hearing by the California Supreme Court on July 5, 1978, petitioner sought review in this Court by petition for writ of certiorari filed on October 3, 1978 (No. 78-567). On June 25, 1979, this Court granted the writ, vacated the decision of the court of appeal, and remanded the cause for reconsideration in light of Arkansas v. Sanders, 442 U.S. 753 (1979). 443 U.S. 903.

conferred by Title 28, United States Code, section 1257(3).

## CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendments Four and Fourteen, section 1.

## STATEMENT OF THE CASE

On January 23, 1975, the District Attorney of Solano County accused petitioner Jeffrey Richard Robbins of possession, possession for sale, and transportation of marijuana, in violation of California Health and Safety Code sections 11357, 11359, and 11360; and driving under the influence of a drug, in violation of Vehicle Code section 23105 (CT 8-9).[2/] Petitioner pleaded not guilty (CT 11), was tried by

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2. "CT" refers to the Clerk's Transcript on Appeal; "RTS" refers to the Reporter's Transcript of the suppression hearing; "RT" refers to the Reporter's Transcript of trial proceedings; "PHT" refers to the Transcript of the preliminary hearing; "JA" refers to the Joint Appendix.

a jury (CT 13), and on May 1, 1975, was convicted of possession, possession for sale, and transportation of marijuana, but was acquitted on the remaining charge (CT 48-49).

Proceeding eastbound on Interstate Route 80 in Solano County at 1:45 a.m. on January 5, 1975, California Highway Patrol Officers Ronald DePue and Richard Stoltz noticed petitioner Jeffrey Richard Robbins driving in the same direction in a blue, 1966 Chevrolet four-door station wagon along parallel Nelson Road (RTS 4-5; PHT 6; JA 6, 55-56). As the officers observed petitioner at a distance of about one tenth of a mile, Robbins twice crossed the centerline of the roadway (RTS 6; JA 58). Approaching a curve, petitioner's station wagon drifted into the oncoming lane the full width of the vehicle, its right wheels reaching the center line

(RTS 6; JA 58). Petitioner managed to return his vehicle to the right side of the road but, while negotiating the curve, drifted three feet across the center line (RTS 6-7; JA 58-59). DePue also noted that petitioner was driving 30 miles per hour in what DePue thought was a 55 mile-per-hour zone (RTS 6; JA 57). Judging petitioner's driving to be erratic, Officer DePue and Sergeant Stoltz followed and stopped him "to determine why it had left -- was operating outside of a marked road lane" (RTS 7; JA 60).

Petitioner immediately alighted, meeting DePue midway between their vehicles (RTS 8; PA 61). The officer asked for petitioner's driver's license and ownership registration (RTS 9; JA 62).[3/] Petitioner, perspiring

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3. California Vehicle Code section 4454 requires owners to maintain the
(Footnote continued next page)

profusely, swallowing rapidly, his eyes bloodshot and watery, experienced difficulty in removing the license from his wallet (PHT 5, 17; JA 9, 29). When petitioner opened his car door to retrieve his registration, DePue, standing three to four feet behind him, smelled the familiar odor of burned marijuana within the vehicle (PHT 6-7; RTS 9-10; JA 10-11, 64-65). The officer also noted smoke in the station wagon's interior (RT 43).

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(Footnote continued from previous page)

registration or a facsimile copy in their vehicle. Vehicle Code section 2804 authorizes California Highway Patrol officers, "upon reasonable belief that any vehicle is being operated in violation of any provisions of this code" to "require the driver of the vehicle to stop and submit to an inspection of the . . . registration card." Vehicle Code section 12951 obliges a driver to carry his license while driving and to present it upon demand of a peace officer enforcing traffic regulations.

Officer DePue then pat-searched petitioner for weapons (RTS 10; JA 65), finding only a vial of malodorous liquid (RTS 11; JA 65-66). DePue next entered the passenger compartment to recover a pair of tweezers observed on the front seat (RTS 12; JA 67). The officer previously had observed such devices used to hold marijuana roaches (RT 43). After petitioner vomited (RTS 12; JA 68), DePue reentered the station wagon to find two pairs of tweezers on the dashboard, one with a burned, hand-rolled cigarette butt, and a cookie tin on the rear floor (PHT 7; RTS 14-16; JA 12-13, 70-75). Inside the tin were two packs of cigarette papers and a plastic baggie containing marijuana (PHT 8; RTS 18; JA 13, 77).

While Officer DePue searched the passenger compartment, petitioner remarked to Sergeant Stoltz, "What you

are looking for is in the back" (RTS 18, 25; JA 77, 89). Stoltz relayed this statement to DePue, who then unlocked the back of the station wagon, raised the floorboard, and found a brown tote bag, a briefcase, and two green plastic bags which had been taped closed (PHT 23-24; JA 39-40).

It was stipulated that the green bags each contained 15.25 pounds of marijuana (PHT 25; JA 42). It was further stipulated that three plastic bags in the tote bag contained, respectively, 474.2 grams, 445.3 grams, and 475.3 grams of marijuana. A pint glass jar also found in the tote bag contained 54.7 grams of marijuana. The cookie tin contained 12.7 grams of marijuana seeds and 3.8 grams of marijuana (PHT 25; JA 42-43). Inspector Grundy of the Solano County Drug Abuse Bureau placed the street value of the seized contraband at

approximately $8,000 (RT), a quantity sufficient to supply an individual user for 17 years (RT 189).

About ten minutes after the contraband was discovered, petitioner was advised of his Miranda rights (RTS 21; JA 82). He was not interrogated by the arresting officers (RT 58). Prior to the admonition petitioner told DePue that he did not wish "to take the fall for this" (RT 58), and asked Stoltz what it would take "to get out of this?" The sergeant replied that disposition would follow booking. Petitioner said, "In my left pocket, check it." Petitioner's left pocket contained $521.00 (RT 122).

## SUMMARY OF ARGUMENT

On January 5, 1975, two and one-half years before United States v. Chadwick, 433 U.S. 1 (1977) was decided and four and one-half years before Arkanss v. Sanders, 442 U.S. 753

(1979), was announced, a California Highway Patrol officer seized and searched petitioner's car and containers found therein with probable cause to believe that the vehicle and receptacles contained marijuana. The decisions of the California Supreme Court and Courts of Appeal, and the Courts of Appeals for several federal circuits had squarely held that the search of containers found in a car under those circumstances was reasonable. The search in this case was conducted in reasonable reliance upon those decisions.

Petitioner argues that, notwithstanding those decisions, the evidence seized as a result of the search of his belongings should have been excluded by the trial court. Respondent submits that where, as here, a search is conducted in accordance with existing

constitutional norms, the exclusionary rule should not be invoked to suppress reliable evidence, free the guilty and punish society. The purpose of the rule is to deter police misconduct. When the conduct of the officer was lawful at the time, it would be irrational to suppress evidence as a result of an unforeseeable intervening change in the law. Chadwick could not have been anticipated and should not be applied to invalidate a search which was lawful at the time it was made.

Turning to the search, petitioner argues that all warrantless searches are per se unreasonable, subject only to a few carefully delineated exceptions. This Court has held that luggage taken from an automobile may not be searched without a warrant in the absence of exigent circumstances. To permit a predictable application of the

Fourth Amendment, petitioner asserts that "luggage" must include all containers which are intended to protect their contents from observation by the outside world. Therefore, the containers -- cookie tin, tote bag, and plastic bags -- should not have been searched without a warrant.

Respondent replies that not all containers found in vehicles deserve the protection of the warrant clause of the Fourth Amendment. This Court's cases explain that the reasonable expectations of privacy attending the place to be searched or the thing to be seized determines whether a warrant -- or even probable cause -- is required. Those expectations are determined not by subjective personal desires but by objective societal norms. The crucial issue is whether the search would violate society's sense of security, engendered

and shaped by the customs and values of the past and present.

Respondent submits that the Court's cases, most notably United States v. Chadwick, 433 U.S.1 (1977); and Arkansas v. Sanders, 442 U.S.753 (1979), teach that the containers deserving the protection of the warrant requirement are those which reasonably indicate to an objective observer that they were intended to house papers or personal effects, construing that phrase to mean wearing apparel and other articles intimately associated with the human body. To determine whether the container is intended to be a repository for papers and effects, the searching police officer must consider all of the circumstances, including the nature of the container, the manner in which it is secured, the place where it is found,

and the results of any lawful sensory perception.

Applying these criteria to the cookie tin and plastic bags, we assert that there was probable cause to believe that they contained marijuana and no reason to believe that they contained anything else. Accordingly, their search by Officer DePue was valid.

## ARGUMENT

### I

### PETITIONER'S EXPECTATION OF PRIVACY IN THE CONTAINERS SEARCHED WAS NOT SO INTENSE THAT A SEARCH WARRANT WAS REQUIRED.

Petitioner argues: (1) warrantless searches are unreasonable per se, subject only to a few specifically established and well-delineated exceptions; (2) absent consent or exigent circumstances, luggage taken from a vcehicle may not be searched without a

warrant; (3) for purposes of the warrant requirement, "luggage" must be construed to include all containers whose contents their owner has attempted to shield from the outside world; (4) in this case, petitioner attempted to conceal the contents of the cookie tin, tote bag, and taped plastic bags; (5) as he did not consent to their search and as Highway Patrol Officers could have taken them to headquarters while seeking a warrant, the warrantless search was unlawful; (6) therefore, the evidence seized should have been suppressed. For the reasons which follow, respondent submits that the search conducted on Highway 80 in the early morning of January 5, 1975, was proper and that California courts did not err in admitting the evidence and, ultimately, affirming petitioner's convictions.

A. THE WARRANT REQUIREMENT

Apparently begining with dictum in Carroll v. United States, 267 U.S. 132, 156 (1925), this Court has remained faithful to the proposition that a warrant is necessary to conduct a search unless some well-defined exception excused the procurement of prior judicial authorization[4/]. Mincey v. Arizona, 437 U.S. 385, 390 (1978); Michigan v. Tyler, 436 U.S. 499, 504-505, 509 (1978); Marshall v. Barlow's, Inc., 436 U.S. 307, 312 (1978); Schneckloth v. Bustamonte, 412 U.S. 218,

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4. The importance and relevance of this rule regarding the search of homes was emphasized shortly after Carroll in Agnello v. United States, 269 U.S. 20, 32 (1925): "[I]t has always been assumed that one's house cannot lawfully be searched without a search warrant, except as an incident to a lawful arrest therein." The primacy of the home is still recognized in this Court's recent cases. See Payton v. New York, 445 U.S. 573, 585 (1980); United States v. United States District Court, 407 U.S. 297, 323 (1972).

219 (1973); United States v. United States District Court, 407 U.S. 297, 316-318 (1972); Coolidge v. New Hampshire, 403 U.S. 443, 455-481 (1971) (plurality opinion).[5] We do not ask this Court to retreat from this salutary principle, which is part of the bedrock of our free society. However, to determine the reasonableness of the search which occurred in this case, it is necessary to consider some of the exceptions to the warrant requirement and

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5. Accord, Vale v. Louisiana, 399 U.S. 30, 34-35 (1971); Chimel v. California, 395 U.S. 752, 762 (1969); Mancusi v. DeForte, 392 U.S. 364, 370-371 (1968); Katz v. United States, 389 U.S. 347, 357 (1967); Camara v. Municipal Court, 387 U.S. 523, 528-529 (1967); Stoner v. California, 376 U.S. 483, 486 (1964); Chapman v. United States, 365 U.S. 610, 613 (1961); Jones v. United States, 357 U.S. 493, 497, 499 (1958); United States v. Jeffers, 342 U.S. 48, 51 (1951); McDonald v. United States, 335 U.S. 451, 454 (1948); Trupiano v. United States, 334 U.S. 699, 705 (1948); Johnson v. United States, 333 U.S. 10, 14-15 (1948).

their legal and theoretical justifications.

It has been axiomatic that the warrant requirement is excused if exigent circumstances require an immediate search or seizure. E.g., Warden v. Hayden, 387 U.S. 294, 298-300 (1967). However, many of the exceptions to the search warrant requirement cannot be explained upon that basis. The automobile search doctrine is a good example. When police stop a car on the street or highway because they have probable cause to believe that it contains contraband or evidence of a crime, they may search it without a warrant. Colorado v. Bannister, ___ U.S. ___, 101 S.Ct. 42 (1980); Arkansas v. Sanders, 442 U.S. 753, 760 (1979); Texas v. White, 423 U.S. 67, 68 (1975); Chambers v. Maroney, 399 U.S. 42, 47-49 (1970); Carroll v. United States, 267 U.S. 132, 153 (1925).

The search may be conducted on the spot (Carroll v. United States, supra; Colorado v. Bannister, supra), or at the police station garage. Texas v. White, supra; Chambers v. Maroney, supra; cf. Cady v. Dombrowski, 413 U.S. 433, 439-449 (1973); Cooper v. California, 386 U.S. 58 (1967).

Although some cases have suggested that the warrantless search is necessitated by the exigent circumstances occasioned by the car's mobility (Arkansas v. Sanders, supra, 442 U.S. at 761; Chambers v. Maroney, supra, 399 U.S. at 49-50), that rationale makes the station house search cases inexplicable despite attempts to reconcile them with the warrantless search exception. Arkansas v. Sanders, supra, 442 U.S. at 765 n.14; Note, Warrantless Searches and Seizures of Automobiles, 87 Harv.L.Rev.835, 843-845 (1974). Noting that "warrantless

searches of vehicles [have been upheld] in cases in which the possibilities of the vehicle's being removed or evidence in it destroyed were remote, if nonexistent" (Cady v. Dombrowski, supra, 413 U.S. at 441-442), this Court has concluded that a warrantless search is justified by the diminished expectation of privacy which surrounds the automobile: "One has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as the repository of personal effects." Cardwell v. Lewis, 417 U.S. 583, 590 (1974) (plurality opinion); United States v. Chadwick, supra, 443 U.S. at 12. "Automobiles operate on public streets; they are serviced in public places; they stop frequently; they are usually parked in public places; their exteriors are highly visible; and they

are subject to extensive regulation and inspection." Rakas v. Illinois, 439 U.S. 128, 154 n.2 (1978) (Powell, J., concurring). See also South Dakota v. Opperman, 428 U.S. 364, 367-368 (1976).

A second example is the administrative search. Generally, searches of businesses for safety violations and homes for unsanitary conditions require the issuance of search warrants. Marshall v. Barlow's, Inc., 436 U.S. 307 (1978); Camara v. Municipal Court, 387 U.S. 523 (1967); See v. Seattle, 387 U.S. 541 (1967). However, an exception from the search warrant requirement has been recognized for "pervasively regulated business[es]" (United States v. Biswell, 406 U.S. 311, 316 (1972) [firearms]), and for "closely regulated" industries "long subject to close supervision and inspection." Colonnade Catering Corp. v. United States, 397

U.S. 72, 74, 77 (1970) (liquor). Although it was pointed out in Biswell that it would be "inconvenient" to seek a warrant (406 U.S. at 316), the same is true of any unannounced or frequent inspection procedure. The crux of the exception to the warrant requirement is that the inspections "pose only limited threats to the [gun] dealer's justifiable expectations of privacy. When a dealer chooses to engage in this pervasively regulated business and to accept a federal license, he does so with the knowledge that his business records, firearms, and ammunition will be subject to effective inspection. . . . The dealer is not left to wonder about the purposes of the inspector or the limits of his task." Id. at 316; see also Marshall v. Barlow's Inc., supra, 436 U.S. at 313.

Third, the "open fields" doctrine permits police to enter property not falling within the curtilege and to seize items of evidentiary value without a warrant or evidence of exigent circumstances. Hester v. United States, 265 U.S. 57 (1924). Hester, which has survived the rejection by Katz v. United States, 389 U.S. 347 (1967),[6] of the doctrine of "constitutionally protected areas" (id. at 351; see Rakas v. Illinois, 439 U.S. supra, at 144 n.12. [1979]), "is now viewed as merely an application of the principle that Fourth Amendment protections do not apply where no reasonable expectation of privacy exists." People v. McClaugherty,

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6. The formulation of the so-called Katz rule actually is found in the concurring opinion of Mr. Justice Harlan: "My understanding of the rule that has emerged from prior decisions is that there is a two-fold requirement, first

(Footnote continued next page)

193 Colo.360, 566 P.2d 361, 363 (1977); accord, United States v. Freie, 545 F.2d 1217, 1223 (9th Cir.1976), cert. den. 430 U.S. 966 (1977).

It is important to realize, however, that a seizure in the Fourth Amendment sense has occurred in the foregoing situation. The inescapable conclusion is that a search or seizure is reasonable if the person who is searched has no reasonable expectation that he will be free from intrusions.[7/]

(Footnote continued from previous page)

that a person have exhibited an actual (subjective) expectation of privacy and, second that the expectation be one that society is prepared to recognize as 'reasonable.'" Katz v. United States, supra, 389 U.S. at 361. This Court has adopted Justice Harlan's formulation in subsequent decisions. See Smith v. Maryland, 442 U.S. 735, 739-740 (1979).

7. Similarly, the "plain view" exception to the warrant requirement (Coolidge v. New Hampshire, 403 U.S.443 465-468 [1971]; Harris v. United States, 390 U.S. 234[1968]) justifies the

(Footnote continued next page)

Fourth, this Court has held that a warrant is not required to seize or search abandoned property. Abel v. United States, 362 U.S. 217, 241 (1960). Again, no showing of exigent circumstances is required. This Court's citation in Abel (id. at 241) to Hester v. United States, supra, indicates that the reason for the dispensation of the warrant requirement is that there is no property interest -- to use the pre-Katz talisman -- or no reasonable expectation of privacy -- to use the post-Katz rubric -- in the property seized.

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(footnote 7 continued)

legality of the observation but does not justify the seizure. 1 Lafave, Search and Seizure, section 2.2, at 245 (1978). This Court has not required exigent circumstances, merely stating that it would be a "needless inconvenience" to require police to seek a warrant. Coolidge v. New Hampshire, supra, at 468.

Fifth, even the right to search an arrestee without a warrant as an incident to his arrest (Gustafson v. Florida, 414 U.S. 260 [1973]; United States v. Robinson, 414 U.S. 218 [1973]; Chimel v. California, 395 U.S. 752 [1969]), can be alternatively explained by the reduction in privacy of his person upon arrest. "I believe that an individual lawfully subjected to a custodial arrest retains no significant Fourth Amendment interest in the privacy of his person. . . . The search incident to arrest is reasonable under the Fourth Amendment because the privacy interest protected by that constitutional guarantee is legitimately abated by the fact of arrest." United States v. Robinson, supra, 414 U.S. at 237-238 (Powell, J., concurring). This rationale explains United States v. Edwards,

415 U.S. 800 (1974), which upheld the seizure and search of the defendant's clothing several hours after his arrest. See id. at 808-809. It is clear that no exigent circumstances excused the failure to seek a warrant. Id. at 811 (Stewart, J., dissenting).

Finally, and most relevant to the issue before this Court, although packages in the mails (Walter v. United States, ___ U.S. ___, 100 S.Ct. 2395, 2400-2401 [1980]; United States v. Van Leeuwen, 397 U.S. 249 [1970], luggage (Arkansas v. Sanders, supra), and other repositories of personal effects (United States v. Chadwick, 433 U.S. 1 [1977]) may not be searched without a warrant, some containers will not "deserve the full protection of the Fourth Amendment" "because [for example] their contents can be inferred from their outward appearance."

Arkansas v. Sanders, supra, at 765-766 n.13. The inference to be drawn from the appearance of the package defeats any reasonable expectation of privacy. Ibid.

This review of representative cases yields the conclusion that, although a person may have a reasonable expectation of privacy to be free from unreasonable governmental intrusion, "the specific content and incidents of this right must be shaped by the context in which it is asserted." Terry v. Ohio, 392 U.S. 1, 9 (1968). Thus, the Fourth Amendment affords a "hierarchy of protection [which] arises not from the application of differing constitutional standards to various locales, but rather from an application of a single standard of reasonableness to all places in accordance with a fundamental understanding that a particular intrusion

into one domain of human experience seriously threatens personal security, while the same intrusion into another domain does not." People v. Dumas, 9 Cal.3d 871, 882-883, 512 P.2d 1208, 109 Cal.Rptr.304 (1973).

Petitioner argues that the Katz formulation plays no part in the analysis of the issue in this case because the test derived from Katz is intended to determine whether a search occurred at all. If it did, as in this case, he would require the issuance of a warrant, absent exigent circumstances (Pet.Brief at 36-40). Decisions of this Court, which have held that a reduced expectation of privacy dispenses with the warrant requirement, devastates petitioner's argument. E.g., United States v. Chadwick, supra, 433 U.S. at 12 (dictum); United States, v. Edwards, supra; Hester v. United States, supra;

see also Cupp v. Murphy, 412 U.S. 291, 294-296 (1973) ("limited intrusion" of scraping fingernails without warrant valid although defendant not under arrest).

One commentator has argued that recognition of gradations of privacy "converts the fourth amendment into one immense Rorschach blot," creating a "general sliding scale approach [which] could only produce more slide than scale." Amsterdam, Perspectives on the Fourth Amendment, 58 Minn.L.Rev.349, 395-396 (1974). However, this fear ignores the teachings of the cases which have been discussed. It overlooks the principles that each case must be judged on its own facts (Go-Bart Importing Co. v. United States, 282 U.S. 344, 357 [1931]), and that the ultimate question is whether a search -- in light of all the facts -- is reasonable. United States v. Edwards, 415 U.S. 800, 807

(1974); Cooper v. California, 386 U.S. 58, 61-62 (1967). The heart of the matter is that "the warrant process can serve as a meaningful device for the protection of Fourth Amendment rights only if used selectively to control those police investigative activities which have the potential to be most destructive of Fourth Amendment values." 1 LaFave, Search and Seizure, § 2.1, at 240 (1978). Assessment of the extent of the destruction requires a determination of the extent of the reasonable expectation of privacy breached by the activity.

In view of this somewhat extended discussion, we posit the following: Not all containers receive the same protection from the Fourth Amendment. Some may be searched without probable cause or a warrant. Cf. Abel v. United States, supra; Hester v. United States, supra. Some require the

existence of probable cause and the issuance of a warrant. United States v. Chadwick, supra; United States v. Van Leeuwen, supra. In the middle of the Fourth Amendment spectrum are those containers which may be searched upon probable cause alone. Arkansas v. Sanders, supra, n.13. We will now attempt to identify the criteria which will determine to what extent the containers in this case -- cookie tin, tote bags, plastic bags -- deserved protection of the Fourth Amendment.

B. THE KATZ EXPECTATION OF PRIVACY DOCTRINE.

Before turning to the specific issue presented by this case, namely, whether the police should have secured a warrant to search the containers found in petitioner's car we consider in somewhat greater detail the Katz rule,

as formulated by Mr. Justice Harlan: "[T]here is a two-fold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable'". 389 U.S. at 361.

The first requirement has been criticized on the ground that a subjective expectation can be neutralized by, for example, a governmental announcement that everyone is under comprehensive electronic surveillance. Amsterdam, Perspectives, supra, at 384; Note, A Reconsideration of the Katz Expectation of Privacy Test, 76 Mich.L.Rev.154, 158 (1977). Professor Amsterdam has suggested that the relevant question is "what we should demand of government." Fourth Amendment, supra, at 384. Another

commentator has suggested that what should be demanded, as a minimum content of the Fourth Amendment, may be determined under the traditional constitutionally protected areas test. (E.g., Silverman v. United States, 365 U.S. 505 (1961).) Note, supra, 76 Mich.L.Rev.at 182. This approach has received qualified acceptance from the Court. Rakas v. Illinois, supra 439 U.S. at 143 n.12.

The second inquiry is whether the expectation of privacy, if present, is reasonable. Courts do not make this determination by "fall[ing] back on the notion that those expectations of privacy which are legitimate depend primarily on cases deciding exclusionary-rule issues in criminal cases." Ibid. Rather, "other social considerations" determine which expectations are to be constitutionally enforced. Note, From

Private Places to Personal Privacy: A Post-Katz Study of Fourth Amendment Protection, 43 N.Y.U.L.Rev. 968, 983 (1968). Justice Harlan believed that justifiable expectations "are in large part reflections of laws that translate into rules the customs and values of the past and present." United States v. White, 401 U.S. 745, 786 (1971)(dissenting opinion). This Court has reaffirmed that property concepts are relevant, although not dispositive, in "determining the presence or absence of the privacy interests protected by [the Fourth] Amendment." Rakas v. Illinois, supra, 439 U.S. at 143 n.12; see also United States v. Salvucci, ___ U.S. ___, 100 S.Ct. 2547, 2553 (1980); Rawlings v. Kentucky, ___ U.S. ___, 100 S.Ct. 2556, 2561 (1980).

As Professor Amsterdam sees it, the "ultimate question" is whether the

police practice, if "permitted to go unregulated by constitutional restraints, [would diminish] the amount of privacy and freedom remaining to citizens . . . to a compass inconsistent with the aims of a free society." Perspectives, supra, at 403. Amsterdam's position echoes that of Justice Harlan, who would have "assess[ed] the nature of a particular practice and the likely extent of its impact on the individual's sense of security balanced against the utility of the conduct as a technique of law enforcement." United States v. White, supra, 401 U.S. at 786 (dissenting opinion).

We conclude that the reasonableness of the search in this case must be determined by the "sense of security" which a reasonable man would have in the containers which were searched. That

sense is derived from the "customs and values of the past and present" as they relate to the intended purpose of the container and the way in which it actually was used. We now turn to an analysis of the cases bearing upon these issues to determine whether they provide criteria to decide the legality of the search of the containers in petitioner's car.

C. CONTAINERS DESERVING THE PROTECTION OF THE WARRANT CLAUSE.

United States v. Chadwick, supra, invalidated the warrantless search of a 200-pound double-locked footlocker. In discussing the defendant's expectations of privacy, this Court observed that "luggage is intended as a repository of personal effects." The contents of luggage "are not open to public view . . .; nor is luggage

subject to regular inspections and official scrutiny on a continuing basis." 433 U.S. at 13. In Arkansas v. Sanders, supra, pointing out that "the very purpose of a suitcase is to serve as a repository for personal items" (442 U.S. at 764), this Court held "that the warrant requirement of the Fourth Amendment applies to personal luggage taken from an automobile to the same degree it applies to such luggage in other locations." Id. at 766. But the Court took pains to explain that not "all containers and packages found by police during the course of a search will deserve the full protection of the Fourth Amendment. . . . [A] warrant generally is required before personal luggage can be searched and that the extent to which the Fourth Amendment applies to containers and other parcels

depends not at all upon whether they are seized from an automobile." Id. at 764-765 n. 13 (emphasis added).

This Court thus differentiated "luggage" from "containers", "packages" and "parcels". Since Chadwick and Sanders were decided, state and lower federal courts have had to categorize containers for the purpose of determining when the warrant requirement applied and when probable cause alone was constitutionally sufficient. As Sanders predicted, their efforts have not produced a coherent body of decisional law.

At one end of the spectrum, courts have been generally consistent in holding that a warrant is required to search such containers normally associated with personal luggage as suitcases, duffle bags, tote bags and knapsacks.

E.g., United States v. MacKay, 606 F.2d 264 (9th Cir. 1979); United States v. Meier, 602 F.2d 253 (10th Cir.1979); United States v. Bloomfield, 594 F.2d 1200 (8th Cir.1979); United States v. Johnson, 588 F.2d 147 (5th Cir.1979); United States v. Stevie, 582 F.2d 1175 (8th Cir.1978) cert.den. 443 U.S. 911 (1979); United States v. Vallieres, 443 F.Supp.186 (D.Conn.1977); Scisney v. State, ____ Ark.____, 605 S.W.2d 451 (1980); People v. Minjares, 24 Cal.3d 410, 591, P.2d 514, 153 Cal.Rptr.224 cert.den., 444 U.S. 887 (1979); State v. Walker, 93 N.M. 769, 605 P.2d 1168 (1980); State v. Marcum, 24 Wash.App.441, 601 P.2d 975 (1979).[8/]

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8. One court held that the contents of a knapsack were legally seized because a bag of marijuana was on the outside and the flaps of the sack could easily be pushed aside to permit visual inspection. State v. Schrier, 283 N.W.2d 338 (Ia. 1979)

Briefcases have also been treated as repositories of personal effects which are deserving of the protection of the warrant clause. United States v. Presler, 610 F.2d 1206 (4th Cir.1979); United States v. Calandrella, 605 F.2d 236 (6th Cir.), cert.den. 444 U.S. 991 (1979); United States v. Schleis, 582 F.2d 1166 (8th Cir.1978); Webb v. State, 373 So.2d 400 (Fla.App.1979); Araj v. State, 592 S.W.2d 603 (Tex.Crim.Ap.1979).

At the other end of the spectrum, courts have been virtually unanimous in holding that paper bags are not entitled to the protection of the warrant clause. United States v. Sutton, 636 F.2d 96 (5th Cir.1981); United States v. Brown, 635 F.2d 1207 (6th Cir.1980); United States v. Honigman, 633 F.2d 1336 (9th Cir.1980);

United States v. Jiminez, 626 F.2d 39 (7th Cir.1980); United States v. Mackey, 626 F.2d 684 (9th Cir.1980); State v. Guzman, 362 So.2d 744 (La.1978); State v. Cavegn, 294 N.W.2d 717 (Minn.1980); State v. Johnson, 277 N.W.2d 346 (Minn.1979). Mackey explained that the paper bag "is among the least private of containers. It is easily torn, it cannot be latched, and, to a greater extent than most containers, its contents can frequently be discerned merely by holding or feeling the container." 626 F.2d at 687.

Between these antipodal situations lie a multitude of containers which offer varying levels of privacy. Courts have held that police are not required to seek warrants when they search: a department store box (United States v. Neumann, 585 F.2d 355 [8th

Cir.1978]; People v. Maldonado, 76 App. Div.2d 691, 431 N.Y.S.2d 580 [1980]; a soft drink cup with an opaque plastic top (People v. Diaz, 101 Cal.App.3d 440, 161 Cal.Rptr. 645 [1980]; a taped scrabble box (United States v. Gaultney, 581 F.2d 1137 [5th Cir.1978]); a pillow case (People v. Suennen, 114 Cal.App.3d 192, 170 Cal.Rptr. 677 [1980]); a tool box (Wyss v. State, 262 Ark.506, 558 S.W.2d 141 [1977]); an electric razor case (Cooper v. Commonwealth, 577 S.W.2d 34 [Ky.App.1979]); a match box (Duncantell v. State, 563 S.W.2d 252 (Tex.Crim.App.1978]); an envelope (United States v. Sanders, 631 F.2d 1309 (8th Cir.1980]); and 300 cardboard boxes, some of them broken open, in the hold of a ship (United States v. Blair, 493 F.Supp.398 [D.Md.1980]).

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Containers which courts have held are deserving of the warrant protection include: a guitar case (United States v. Bella, 605 F.2d 160 [5th Cir. 1979]); a shaving kit (Moore v. State, 594 S.W.2d 245 [Ark.1980]); a plastic portfolio (United States v. Miller, 608 F.2d 1089 [5th Cir.1979]); a camera case (State v. DeLong, 43 Or.App.183, 602 P.2d 665 [1979]); taped or sealed cartons (United States v. Dien, 609 F.2d 1038 [2d Cir.1979]); People v. Boyd, 86 Ill.App.3d 73, 407 N.E.2d 982 [1980]; State v. White, 94 N.M.687, 615 P.2d 1004 [1980]); a lunch pail (People v. Pace, 92 Cal.App.3d 199, 154 Cal.Rptr.811 [1979]); a candy tin (People v. Silvey, 110 Cal.App.3d 67, 167 Cal.Rptr.566 [1980]); a plastic cooler (United States v. Markland, 489 F.Supp.932 [D.Conn.1980]; contra, State

v. Heberly, 120 Ariz.541, 587 P.2d 260 [1978][ice chest]), and "boxes" of various functions (United States v. Isom, 588 F.2d 858 [2d Cir.1978] [dictum]; United States v. Ocampo, 492 F.Supp.1211 [E.D.N.Y.1980]; State v. Metcalfe, 593 P.2d 638 [Alas.1979]; People v. Dalton, 24 Cal.3d 850, 598 P. 2d 467, 157 Cal.Rptr.497 [1979], cert. den., 445 U.S. 946 [1980]; People v. Rinaldo, 80 Ill.App.3d 433, 399 N.E.2d 1027 [1980] [contained microwave oven]; contra, State v. Kahlon, 172 N.J.Supr.331, 411 A.2d 1178 [1980] [box partially open]).

Courts have divided over the admissibility of evidence taken from purses. The fruits of such searches have been held admissible in United States v. Moreno, 569 F.2d 1049 (9th Cir.1978); United States v. Venizelos,

495 F.Supp.1277 (S.D.N.Y.1980); Hinkel v. Anchorage, 618 P.2d 1069 (Alas.1980); Sumlin v. State, 587 S.W.2d 571 (Ark. 1979); Daigger v. State, 595 S.W.2d 653 [1980]; People v. Barnett, 113 Cal.App. 3d 563, 170 Cal.Rptr 255 (1980); People v. Harris, 105 Cal.App.3d 204, 164 Cal.Rptr.296 (1980); State v. Sabater, 601 P.2d 11 (Kan.App.1979), cert. den., 446 U.S. 518 [1980]; State v. Thompson, 596 P.2d 174 (Kan.App.1979); Dawson v. State, 40 Md.App. 640, 395 A.2d 160 (1978); State v. Webb, 560 S.W.2d 318 (Mo.App.1977). Contrary results were reached in United States v. Farrar, 470 F.Supp. 128 (S.D.Miss. 1979); People v. Redmond, 73 Ill.App.3d 160, 390 N.E.2d 1364 (1979); Bradford v. State, 401 N.E.2d 77 (Ind. App.1980); Ulesky v. State, 379 So.2d 121 (Fla.App.1979).

Nor have opaque plastic bags received consistent treatment. Their searches have been sustained in United States v. Mannino, 635 F.2d 110 (2d Cir.1980); United States v. Goshorn, 628 F.2d 697 (1st Cir.1980); and United States v. Gooch, 603 F.2d 122 (10th Cir. 1979); United States v. Morquecho, 474 F.Supp.1134 (S.D.Tex.1979); and Flynn v. State, 374 So.2d 1041 (Fla.App.1979), and condemned in United States v. Rivera, 486 F.Supp.1025 (N.D.Tex.1980), and State v. Blais, 416 A.2d 1253 (Me.1980).

This Court is asked to bring order out of the chaos which has followed Chadwick and Sanders. It is necessary to fashion a workable rule -- to be applied by all law enforcement officers -- to determine which containers deserve the warrant protection

and which may be searched upon probable cause alone. Petitioner insists that the warrant clause covers all containers which protect their contents from unwanted eyes (Brief at 30). He argues strenuously that all attempts to categorize containers with respect to the warrant clause must fail because certain crucial concepts defy definition. If the container to be protected by the warrant clause must be "normally intended to serve as a repository for personal effects," petitioner asks rhetorically: What is normal? Whose intent? What is a repository? What is a personal effect? (Brief at 30-36). No, counsels petitioner, the "plain truth" is that the warrant clause must protect all containers which function to keep out prying eyes (Brief at 34). A number of cases explicitly or impliedly

have adopted this position. See, e.g., United States v. Markland, supra, 489 F.Supp. 932; People v. Pace, supra, 92 Cal.App.3d 199, 154 Cal.Rptr.811; People v. Boyd, supra, 86 Ill.App.3d 73, 407 N.E.2d 982; State v. Blais, supra, 416 A.2d 1253.

Although superficially appealing, petitioner's position stands upon a legally untenable foundation. He asks this Court to vindicate subjective expectations of privacy in containers which keep out the prying eye. He ignores the dispositive question whether society is prepared to consider that expectation to be "reasonable" or "legitimate." Alternatively, he assumes that all manifested expectations of privacy are legitimate per se. His position runs contrary to an unbroken string of precedents from Katz to Rakas,

teaching that all expectations of privacy, however well justified, cannot be deemed to be legitimate without reference to the "customs and values of the past and present." If petitioner prevails, it will mean that the warrant clause protects the paper bag, the match box, the candy tin, the cigar box, the soda cup (provided the top is opaque), and any other container into which a person cannot look. Such a result will further tax the resources of law enforcement and trivialize the warrant clause of the Fourth Amendment. See 2 Lafave, Search and Seizure, section 7.2 at 78 (1981 Supp.) We do not believe that the framers of that Amendment, or of the Fourteenth Amendment, intended to require police to seek a warrant to search a cookie tin. What is more to the point, we do not believe that this

society's customs and values are threatened by the warrantless search, upon probable cause, of such a receptacle.

We submit that Katz, Chadwick, Rakas, and Sanders indicate the following rule: If a reasonable person, in light of all of the circumstances, has cause to believe that the container in question is a repository of personal effects, then a warrantless search is prohibited. If, however, there is no reason to believe that the container is a receptacle for such articles, then probable cause alone is sufficient to justify the search. In evaluating all of the circumstances, the searching police officer may consider the intended purpose of the container, its present use, how it is secured or sealed, how it is stored, its outside markings, its weight and consistency, and any odor it

may emit. See United States v. Mannino, supra, 635 F.2d 110; United States v. Goshorn, supra, 628 F.2d 697; United States v. Rivera, supra, 486 F.Supp.1025. "Personal effects" comprises "such tangible property as is worn or carried about the person, or tangible property having some intimate relation to the person. . . ." Annot., 30 A.L.R.3d 797, 811 (1970). "Papers," specifically mentioned in the Fourth Amendment, should be included under the rubric of "personal effects".

Under this test, in keeping with the spirit of Chadwick and the Fourth Amendment, luggage and briefcases normally could not be subjected to a warrantless search. But other containers, not "inevitably associated with the expectation of privacy" (Arkansas v. Sanders, supra, 442 U.S. at

762), could be searched upon probable cause alone, unless the searching officer is, or should be, aware of "specific and articulable facts" (Terry v. Ohio, 392 U.S.1, 21 [1968]), that it is being used to transport personal effects. Thus, if a visual and tactile examination of a paper bag reveals that it is taped shut, and its contents have the weight and consistency of clothing, the policeman should realize that it was intended to serve as a suitcase and treat it as such. If, although sealed, the bag reveals that its contents have the weight and consistency of marijuana, and the odor of marijuana emanates from the bag, there is no reason to believe that the paper bag is a repository for personal effects and may be searched because there is probable cause to believe that it contains contraband.

We believe that the foregoing rule strikes the proper balance between the public need for the detection of crime and the private need for security in one's personal belongings. Surely there is a greater need for privacy in a suitcase than in a tool box. The customs and values of this society dictate that our senses of security in those containers must differ. An item of wearing apparel is simply not the same as a crescent wrench. We recognize that not all can afford suitcases and briefcases to transport personal belongings, but most can take steps to insure their privacy in whatever container they choose. Thus, if the steps they take, as well as the surrounding circumstances, indicate that the container houses personal effects, then a warrant must issue before it is searched. This Court

recognized that there "will be difficulties in determining which parcels taken from an automobile require a warrant for their search and which do not." Arkansas v. Sanders, supra, 442 U.S. at 765 n.13. Those difficulties can be largely overcome by requiring a police officer to seek a warrant before searching a container which he knows, or reasonably should know, houses personal

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effects.[9/] Both petitioner and amicus curiae take issue with footnote 13 of Sanders. Petitioner argues that it is factually inapplicable to this case, for the footnote suggests that the containers which may be searched without a

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9. This rule, however, should not apply to containers, even those holding personal effects, which are within the immediate control of an arrestee at the time of his apprehension. See United States v. Chadwick, supra, 433 U.S.at 14-15; Chimel v. California, supra, 395 U.S. at 763. Thus, wallets, purses, handbags, and other such articles in the possession of the arrestee should be subject to a warrantless search. See United States v. Venizelos, 495 F.Supp. 1277, 1281-1282 (S.D.N.Y. 1980). The conceptual basis for the search is that the arrest and seizure of a person abates any privacy interest in his personal effects in his immediate possession at the time of his arrest. See United States v. Edwards, supra, 415 U.S.800; United States v. Robinson, supra, 414 U.S. at 237-238 (Powell, J., concurring); People v. DeSantis, 46 N.Y.2d 82, 87, 385 N.E.2d 577, 579, 412 N.Y.S.2d 838, 840 (1978), overruled in People v. Belton, 50 N.Y.2d 447, 407 N.E.2d 420, 429 N.Y.S.2d 574 (1980) cert. granted, 49 U.S.L.W. 3509 (1981).

warrant are those which identify their contents (e.g., a gun case). Petitioner's containers were not "self-identifying"[10/] (Brief at 52). Amicus goes even further, insisting that it is inconsistent with established Fourth Amendment doctrine: "The outward appearance of a container can provide no more than probable cause; it cannot excuse the failure to obtain a warrant" (Amicus at 3). The answer to both arguments is identical: If the outward appearance of a container indicates that it is not a repository of personal

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10. It is interesting to note that petitioner is willing to concede a plain sight exception, but not a "plain smell exception" to the warrant clause, a "neat but indefensible sergregation of the human senses . . . ." People v. Marshall, 69 Cal.2d 51, 62, 442 P.2d 665, 69 Cal.Rptr. 585 (1968) (Mosk, J., dissenting). In terms of expectations of privacy, we fail to perceive any valid distinction between the two sensory perceptions.

effects, then there is no reasonable expectation of privacy so elevated that a warrant is necessary to search it.

D. THE SEARCH OF THE CONTAINERS

We now turn to the question whether the search of petitioner's containers[11/] violated the Fourth Amendment. Petitioner does not dispute that the stop of his car was justifiable. Cf. Pennsylvania v. Mimms, 434 U.S. 106 (1977). Nor does he contend that the strong odor of marijuana emanating from

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11. In the California Court of Appeal, we conceded that the search of the cookie tin and the tote bag was invalid. 101 Cal.App.3d 15 39, 182 Cal.Rptr. at 982. We believed that the concession was necessary in view of this State's decisional law as it existed at that time. E.g., People v. Minjares, supra, 24 Cal.3d 410, 591 P.2d.514, 153 Cal.Rptr.224; People v. Dalton, supra, 24 Cal.3d 850, 598 P.2d 467, 157 Cal.Rptr.497; People v. Pace, supra, 92 Cal.App.3d 199, 154 Cal.Rptr.811. We no longer believe that the concession is necessary and do not make it in this Court.

his station wagon was insufficient probable cause to search the vehicle and its contents. See United States v. Rivera, supra, 486 F.Supp.at 1033 (dictum); cf. Johnson v. United States, supra, 333 U.S.at 13. Probable cause was substantially augmented by petitioner's voluntary statement: "What you are looking for is in the back." He contends, quite simply, that 1:45 a.m. the officers should have left the highways unpatrolled while they secured a warrant before searching the cookie tin, tote bag, and plastic bags.

We first consider the cookie tin. The officers had probable cause to believe that it contained marijuana, but had no reason to think that it was used as a repository for personal effects. Nothing about the tin suggested that petitioner used it to store a razor kit,

toiletries, jewelry, or the like. In the absence of any such evidence that petitioner used the cookie tin to store anything other than marijuana (or cookies), it cannot be said that petitioner manifested an expectation of privacy which society must legitmate.

We next consider the green plastic bags. They are not "inevitably" repositories of personal effects, but it is true that petitioner exhibited an intent to secret their contents from the outside world by taping them. However, the officer's sensory inspection, permitted by Chadwick, would negate totally any inference that they contained personal effects. Each bag weighed 15 pounds, and held a form which had the shape, weight, and consistency of a marijuana brick. Had Officer DePue smelled the bags before opening them,

he undoubtedly would have noticed the pungent smell emitted by the marijuana bricks. We conclude that nothing about the circumstances would have indicated to a reasonable observer that the packages contained personal effects. This conclusion would not be altered even if the smell of marijuana did not emanate from the bags. For all the officers could see, the bags contained "mere cargo" and were not entitled to the protection of the warrant clause. See United States v. Gooch, supra, 603 F.2d 122.

In addition, it is doubtful that petitioner could claim a subjective expectation of privacy, for he told the officer that "it" was "in the back." We do not claim, at this late date, that petitioner consented to the search of

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his bags.[12] See Schneckloth v. Bustamonte, supra, 412 U.S. 218. We do submit that his utterance negated any expectation that the officers would seek a warrant before searching the bags. Therefore, society did not grant, nor did petitioner possess, in the plastic bags an expectation of privacy which required the issuance of a search warrant.[13]

We therefore submit that the containers, having the same level of privacy as the car, could be searched along with the car on the basis that there was probable cause to believe that they contained marijuana. See United States v. Mannino, supra, 635 F.2d at

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12. The issue was never litigated because, prior to the unforeseeable result in Chadwick, it was lawful to search containers in cars.

13. We do not make a similar contention about the tote bag.

115; cf. Arkansas v. Sanders, supra, 442 U.S. at 766-768 (Burger, C.J., concurring).

II

EVIDENCE SEIZED IN REASONABLE RELIANCE UPON FEDERAL AND STATE CASES VALIDATING THE SEARCH SHOULD NOT BE SUPPRESSED BECAUSE OF A SUBSEQUENT CHANGE IN THE LAW.

We will assume, without conceding that search in this case was invalid under Chadwick. But that is only the beginning, not the end, of the inquiry, because the illegality of a search does not necessarily require suppression of the evidence seized. Before applying the exclusionary rule, a remedial device not expressly mentioned in the Fourth Amendment, this Court -- or any court -- must balance its costs against its benefits. See United States v. Calandra, 414 U.S. 338, 348-51

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(1974); Kaplan, The Limits of the Exclusionary Rule, 26 Stan.L.Rev.1027, 1032-35 (1974). Typically, the competing interests are the value to society of deterring future police misconduct and the cost of freeing without punishment a defendant whose guilt is proven by the supressed evidence. Note, Judicial Integrity and Judicial Review: An Argument for Expanding the Scope of the Exclusionary Rule, 20 U.C.L.A.L.Rev. 1129, 1149 (1973). When the cost is greater than the benefit, the evidence is not excluded. United States v. Calandra, supra. It is therefore necessary to assess the deterrent effect of the exclusion of the evidence in this case. "Before we penalize police error, therefore, we must consider whether the sanction serves a valid and useful purpose."

Michigan v. Tucker, 417 U.S. 433, 446 (1974).

The search occurred in this case in January of 1975, two and one-half years before Chadwick and four and one-half years before Sanders. At that time, cases of this State (People v. McKinnon, 7 Cal.3d 899 [1972]; People v. Vermouth, 20 Cal.App.3d 746, 98 Cal.Rptr.65 [1971]), and of federal appellate courts (United States v. Giles, 536 F.2d 136 [6th Cir.1976]; United States v. Canada, 527 F.2d 1374 [9th Cir.1975]; United States v. Tramunti, 513 F.2d 1087 [2d Cir.1975]; United States v. Anderson, 500 F.2d 1311 [5th Cir.1974]; United States v. Soriano, 497 F.2d 147 [5th Cir.1974] [en banc], reaffirmed sub.nom United States v. Aviles, 535 F.2d 658 [1976]; United States v. Evans, 481 F.2d 990 [9th

Cir.1973]), upheld the warrantless search of containers for evidence of crime if police had probable cause.[14/]

It bears repeating that the essential purpose of the exclusionary rule is to deter police misconduct. Michigan v. DeFillippo, 443 U.S. 31, 38 n.3 (1979); Stone v. Powell, 428 U.S. 465, 484 (1976); United States v. Peltier, 422 U.S. 531, 542 (1975); Michigan v. Tucker, 417 U.S 433, 446 (1974); United States v. Calandra, 414 U.S. 338, 347 (1974). In Peltier, the Court refused to exclude evidence discovered by searches which arguably complied with existing law. The Court declared: "If the purpose of the exclu-

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14. Accord, Clark v. State, 574 P.2d 1261 (Alaska, 1978); State v. Elliott, 605 P.2d 930 (Haw. 1980); State v. Downes, 31 Or.App. 419, 571 P.2d 914 (1977); Commonwealth v. Berman, 396 A.2d 1237 (Pa. Super. 1978).

sionary rule is to deter unlawful police conduct then evidence obtained from a search should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment." Id. at 542.

Peltier reiterated the reasonable, good faith standard for exclusion set down a year earlier in Michigan v. Tucker, supra, 417 U.S. at 447:

> "The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right. By refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those

particular investigating officers, or in their future counterparts, a greater degree of care toward the rights of an accused. Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force."[15/]

In this case, it is clear that Officer DePue reasonably and in good faith relied upon the then-prevailing rule that containers in a car as well as

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15. The modification of the Exclusionary Rule to conform to the good faith standard has been espoused by Chief Justice Burger (Stone v. Powell, supra, 428 U.S.at 498 [conc.opn.]), Justice Powell (Rakas v. Illinois, supra, 439 U.S. at 156 n.5 [conc.opn.]; Brown v. Illinois, 422 U.S. 590, 609-610 [1975] [conc.opn.]), Justice White (Stone v. Powell, supra, 428 U.S. at 538 [dis.opn.]), and Justice Rehnquist (United States v. Peltier, supra; Michigan v. Tucker, supra). See United States v. Williams, 622 F.2d 830 (5th Cir. 1980).

the vehicle itself may be searched for probable cause. "[U]nless we are to hold that parties may not reasonably rely upon any legal pronouncement emanating from sources other than this Court, we cannot regard as blameworthy those parties who conform their conduct to the prevailing statutory or constitutional norm." United States v. Peltier, supra, 422 U.S. at 542.

In this connection, we note that Chadwick has been held to be prospective, applying only to searches conducted after the day it was decided.[16/] United States v. Calandrella, 605 F.2d 236 (6th Cir.1979); United States v.

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16. Although the search in Arkansas v. Sanders occurred prior to the decision in Chadwick, the State of Arkansas did not argue that Chadwick should be prospectively applied. Thus, until now, this Court has never been asked to decide the temporal application of Chadwick.

Cornejo, 598 F.2d 554 (9th Cir.1979); United States v. Stewart, 595 F.2d 500 (9th Cir.1979); United States v. Choate, 576 F.2d 165, 182 n.20 (9th Cir.1978), United States v. Berry, 571 F.2d (7th Cir. 1978); United States v. Reda, 563 F.2d 510(2d Cir.1977); United States v. Montgomery, 558 F.2d 311 (5th Cir.1977); State v. Conti, 573 S.W. 2d 95 (Mo.Ct. App.1978); Commonwealth v. Berman, 396 A.2d 1237 (Pa.Super.1978); Kemner v. State, 589 S.W.2d 403 (Tex.Crim.App. 1979); contra, United States v. Stevie, supra, 582 F.2d 1175; United States v. Schleis, supra, 582 F.2d 1166; People v. Minjares, supra, 24 Cal.3d 410, 591 P.2d 514, 153 Cal.Rptr.224. The vast majority of the courts considering the question have agreed that, prior to Chadwick, officers who searched containers in cars were reasonably relying upon the

"prevailing constitutional norm."[17/]

This Court will not invoke the exclusionary rule to suppress relevant evidence, free the guilty and punish society unless a compelling social purpose is to be served. See, e.g., United States v. Calandra, supra. In this case, because Officer DePue could not anticipate the formulation of the Chadwick-Sanders rule at the time he conducted the search in the early morning hours of January 5, 1975, the suppression of the evidence would be a

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17. In our opposition to petitioner's first petition for writ of certiorari (No. 78-567), we argued that the rule of Chadwick should apply prospectively. We did not make this argument in the state court after remand because it had been rejected in People v. Minjares, supra. It was, therefore, not abandoned, and may now be made in this Court.

This resolution of this issue is crucial to respondent, for there exists a conflict between this State and the Ninth Circuit.

meaningless sanction, even if this Court concludes that Chadwick today would compel suppression. See United States v. Calandrella, supra, 605 F.2d at 247-252 (fruits of search violating Chadwick held admissible because Chadwick prospective).[18/]

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18. We relegate to a footnote our response to petitioner's curious argument that the court of appeal somehow violated this Court's mandate when it reinstated the judgment of affirmance on new grounds not encompassed within its prior opinion. In 1978, the lower court upheld the search of the containers under the then-established exception to the warrant requirement permitting the probable-cause search of cars and their containers. After this Court's decision in Arkansas v. Sanders, supra, this Court granted certiorari and remanded this case to the court of appeal for reconsideration in light of Arkansas v. Sanders.

Having been told by this Court that there no longer was a "container exception" to the warrant requirement, the court of appeal was obliged to decide whether, under Sanders, the search nevertheless could be sustained

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(Footnote 18 continued)

under other, narrower grounds delineated in that opinion. In footnote 13, this Court explained that not all containers deserved the protection of the warrant requirement and that the nature of the package was relevant in determining expectations of privacy. The lower court decided that the packaging exposed the nature of its contents. This ground was not stated in the court's first opinion because it was unnecessary and because, prior to footnote 13, it really did not exist.

In any event, because the search of the container was reasonable and the evidence was properly admitted, petitioner's argument is moot.

## CONCLUSION

For the foregoing reasons, we submit that the judgment of the California Court of Appeals should be affirmed.

DATED:

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